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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 905

CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York; and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Appellant appeals from an order of the United States District Court for the Southern District of New York, entered on December 14, 1966, which denied an interlocutory injunction to appellant and also dismissed the complaint, and submits this Statement to show this court that it has jurisdiction on the appeal and that a substantial question is involved.

Opinion Below

The District Court wrote an opinion which is appended hereto as Appendix A, *post* 12. It is not yet reported.

Jurisdiction

(i) This case arises from an order of a three-judge district court, entered in the United States District Court for the Southern District of New York, which denied the application of the appellant for an injunction, and dismissed the complaint.

(ii) The order was made on December 13, 1966 and entered in the said District Court on December 14, 1966, Appendix B, *post* 21.

The Notice of Appeal was filed on December 16, 1966 in the said District Court.

(iii) The jurisdiction of this court is conferred by 28 U.S.C., Section 1253.

Statute Involved

The statute involved is Section 887, subd. 1 of the Code of Criminal Procedure of the State of New York (McKinney's Consolidated Laws of New York, volume 66, part 3).

"Section 887. Who are vagrants.

"The following persons are vagrants:

"1. A person who not having visible means to maintain himself lives without employment."

"Section 892. Certificate to constitute record of conviction, and to be filed; commitment of vagrants

"The magistrate must immediately cause the certificate which constitutes the record of conviction, together with the testimony taken before him as to the residence of such vagrant, to be filed in the office of

the clerk of the county, and must, by a warrant signed by him, with his name of office, commit the vagrant for not exceeding six months at hard labor, to the penitentiary or county jail. In those counties of the state where the distinction between county poor and town poor is maintained, the expense of the conviction and maintenance during the commitment of any vagrant committed to the county jail, who shall, at the time of such commitment, have obtained a legal settlement in one of the towns of the county in which said persons shall be convicted, shall be a charge upon the town where they may reside at the time of such commitment."

Construction of the Statute

This statute has been authoritatively construed in *People* v. *Sohn*, 269 N. Y. 330, 334-335, as follows:

> "We think this is what our statute does mean when the words 'vagrants,' 'visible means of support' and 'without employment' are used. Long usage has fixed their significance. These words taken together indicate that the thing aimed at is the loafer or lazy man, the one who hangs about streets and public places without employment or visible means of support when he could with effort obtain something to do. It would be absurd to say that one physically unable to work or an able-bodied person who could not get work came within the meaning of this section."

The statute is used as a pretext for unlawful detention. *People* v. *Robinson*, 13 N. Y. 2d, 296, 301; *People* v. *Davis*, 13 N. Y. 2d, 690.

Questions Presented

1. Is Section 887, subd. 1 of the Code of Criminal Procedure of the State of New York repugnant to the Constitution of the United States?

2. Did the District Court abuse its descretion by abstaining from deciding the constitutional question squarely drawing into question the Constitution of the United States?

3. Should the District Court have dismissed the complaint without rendering judgment on the merits of appellant's constitutional claims?

Statement

The appellant commenced this action for a declaratory judgment and injunction in the United States District Court for the Southern District of New York. Almost all of the essential allegations in the complaint are matters of public record; some appear as transcripts of public records and are set forth as exhibits to the complaint. Others appear in the record of appeal in the New York Court of Appeals in *People* v. *Fenster*, 17 N. Y. 2d, 641 and in *People* v. *Fenster*, 46 Misc. 2d, 179.

The appellant alleged that in three successive months, October 1964, November 1964 and December 1964, he was each time arrested and prosecuted under the above vagrancy statute and each time the charges against him were dismissed for failure of proof under the statute. Each time appellant was prosecuted, he was subjected to arrest, overnight detention, arraignment, expenses of making bail and to the expense of counsel fees.

The dismissal of the December 1964 charge did not occur until a few days before the commencement of this action, for after that successive monthly arrest, he retained his present counsel who instituted a prohibition proceeding in the New York Supreme Court. That prohibition proceeding made claim that the criminal court was without jurisdiction because the statute in question was repugnant to the Constitution of the United States. In the meantime,

during the litigation of the prohibition proceeding, all the way through the New York Court of Appeals, the December prosecution was stayed or continued through court orders.

The New York Supreme Court denied the request for a prohibition judgment in favor of Fenster, not because the remedy was wrong, as the District Court mistakenly states. It denied the remedy because it held the statute constitutional. Instead of the remedy being wrong, the Supreme Court had held that the remedy was a correct one (46 Misc. 2d 179). But because the remedy is discretionary, it proved to be improvident for the purposes of appeal. The Court of Appeals expressly refused to review the merits, 17 N. Y. 2d 641, as without its jurisdiction, contrary to its prior decisions in *Kraemer* v. *County Court of Suffolk County*, 6 N. Y. 2d 363, and *Matter of Murtagh* v. *Leibowitz*, 303 N. Y. 311; *Matter of Baltimore Mail S.S. Co.* v. *Fawcett*, 269 N. Y. 379, 383.

The decision of the New York Court of Appeals occurred on March 24, 1966. After reargument was denied, the December 1964 prosecution proceeded to trial and resulted in a dismissal on June 27, 1966 for what had become routine insufficiency of evidence.

This action was immediately commenced on June 29, 1966.

During the litigation of the prohibition application, Fenster was threatened by the police officer who had arrested him that as soon as the December charge was disposed of, he would again be arrested on a charge under the statute and he was given the same warning by another officer of the precinct, the last such threat taking place in May 1966.

The appellant, fearful of repeated harassments under the cloak of this statute, instituted this action to gain some peace of mind. What with the monthly arrests, monthly

arraignments and monthly appearances for trial, there had been little opportunity afforded to him to enjoy the freedom and privacy any person is entitled to.

In this action, after setting forth the above facts which are matters of public record, he requested that the District Court declare the statute as repugnant to the Constitution of the United States and to enjoin its enforcement.

The defendants appeared and substantially admitted the foregoing, except they denied the allegation of the threats made to Fenster during the litigation of the prohibition proceeding, that he would be again prosecuted. Such a denial is inconsequential, for actions speak louder than words. Under any reasonable inference or computation of mathematical probabilities, a pattern of repeated arrests casts a stronger shadow of fear of the future than would proof of a verbalized threat.

Appellant made an application for a three-judge court based on the substantiality of his claims. Against the opposition of appellees, the motion was granted. A three-judge court was convened which heard the application for an interlocutory injunction. The application for an interlocutory judgment was denied and the complaint was dismissed.

The District Court in its opinion held that the court had jurisdiction, but should abstain from rendering any relief, because under New York law Fenster has a remedy by way of declaratory judgment for the relief he seeks.

The Questions Are Substantial

1. The order of the District Court should be reviewed because it involves an important question under the Constitution of the United States. This court has never passed upon the validity of vagrancy laws (*cf. Edelman* v. *California*, 344 U. S. 357; *Hicks* v. *District of Columbia*, 15 L.

ed. 2d 744). The New York law, we submit, is one especially of significance because of the construction placed upon it by the New York Court of Appeals in *People* v. *Sohn,* 269 N. Y. 330, 334-335. There the court said that the law was directed against loafers or lazy men who are without employment or without means of support and are found on streets or public places.

The statute as so read, we contend, is repugnant to the Constitution of the United States as a denial of due process: It makes indigence or lack of employment as a test whether a person may be sent to jail for six months under Section 892. (Sohn received a sentence of 30 days in jail.) The statute is directed against the loafer and lazy person. We submit, that a person may be a loafer or lazy in the street, or in public places, without incurring the penalties of the statute. *Edwards* v. *California,* 314 U. S. 160, supports this argument. Moreover, being a loafer or lazy with or without funds is not an act for which a person may incur prosecution; rather it is a condition of a person which this court in *Robinson* v. *California,* 370 U. S. 660, has protected.

The statute as construed also denies a person the equal protection of the laws. Under the statute a person with visible means of support may be a loafer or lazy, but not one not so circumstanced. There is also in this an implicit violation of the Thirteenth Amendment.

The statute evidently intends to penalize as a preventative measure against crimes that a person *might* commit. But our jurisprudence does not accept such anticipatory measures as valid, *Edwards* v. *California.*

Whatever purpose such a statute may have served in another era, it does not satisfy modern objectives, what with the proliferation of welfare agencies, employment agencies, social security and other forms of aiding the financially handicapped.

2. Since the constitutional question involved is one of public importance and special circumstances appear, the District Court should not have abstained. The special circumstances in this case cry aloud for relief: Fenster has already been subjected to three successive monthly prosecutions under an invalid law, with more promised to him. Although he has shown that his prosecutions were instituted for harassment and in bad faith, the District Court nevertheless suggested that his remedy is solely in a state court by way of declaratory judgment. By this disposition, the District Court has in effect decided that equitable jurisdiction should not be exercised if a remedy for declaratory judgment exists by a state law. But that is not the law. This court in *Baggett* v. *Bullitt*, 377 U. S. 360, decided contrariwise, for in that case, a state remedy for declaratory relief did exist. Moreover, since such relief is a discretionary remedy in the New York courts (*Delaware Lackawana Railroad Co.* v. *Slocum*, 299 N. Y. 496, 505), the remedy there would be no different than it is in the federal courts. And in that respect it is no different from his abortive prohibition remedy, which too is discretionary.

The suggestion by the District Court that Fenster await a new prosecution at which to challenge the statute is unfortunately impractical, as it does not solve the problem. Firstly, in the face of what has already occurred with respect to the three successive monthly prosecutions indicates that the arrests and prosecutions under the statute come to nought because they are without the slightest substance. Secondly, why should a person in a civilized community, a victim of abuse under color of a statute be required to live in continuous apprehension of arrest in the hope of ultimate vindication of his claim that the statute is invalid? Thirdly, because he is a "vagrant" he occupies a status, and is thus subject to repetitious monthly, weekly or daily arrest! Why should he be a victim of a law that allows

such prosecutions? Such martyrdom should not be expected of the hardiest soul, not to mention the indigent, unemployed and lazy loafer, against whom the statute is directed.

The result is that Fenster has no remedy against the terror of repeated arrests, save the reversal by this court of the order appealed from.

Dombrowski v. *Pfister,* 380 U. S. 479, has recently shown that this court does not expect a person to play a martyr's role before he can receive relief in a federal court against an invalid statute. Fenster's special circumstances are even stronger than those of *Baggett* and *Dombrowski,* for Fenster has been subjected already to three successive prosecutions under an invalid statute, with threats of more to come.

While *Baggett* and *Dombrowski* involve First Amendment protections of speech and association, the principle is not limited to cases under the First Amendment. Certainly, the right to be left alone from repeated prosecutions under an invalid statute ranks high in constitutional protections, for it serves a person little to be able to speak freely, if he must spend a substantial part of his time to free himself from bad-faith prosecutions.

In *Evers* v. *Dwyer,* 358 U. S. 202, which was *not* a First Amendment case, this court held in an action commenced in a District Court, that relief should have been afforded by a three-judge court to a complaint that an ordinance, used to compel a person to sit in a segregated part of a public conveyance, was invalid. The plaintiff in that case sought to use a municipal bus. He had been ordered by the driver to comply with the ordinance by sitting in a part designated for negroes. He refused to comply and was threatened with arrest by police offices who had been summoned. Plaintiff left the bus instead of complying. Thereupon, he instituted an action in a federal court to restrain enforcement of the ordinance. This court held

that the complaint should not have been dismissed and that under the circumstances, the special disabilities imposed by the statute provided plaintiff with "a substantial immediate and real interest in the validity of the statute".

See also, Fordham Law Review, Volume 34, p. 71, *Dombrowski* v. *Pfister*: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Relations, p. 94.

Since the action is one for the protection of a fundamental human right, it does not fall into the class of cases, which seek redress of economic rights, such as *Spielman Motor Sales Co. Inc.* v. *Dodge*, 295 U. S. 89. Even as to the latter class, see *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 328, where at stake was the right to deliver bottles of liquor at an international airport. Certainly, Fenster's claim against successive bad faith prosecutions under an invalid statute, ranks in "special circumstances" as high as the right to deliver liquor.

Moreover, as the statute condemns a person because of his status, it enables successive prosecutions not only on a monthly basis, but on a daily or even hourly basis. Thus, Fenster may be prosecuted under this statute at any time the police will. A fair inference is that it is only the pending positive action that Fenster has taken that has discouraged further prosecutions, albeit, he fears, only during this litigation.

And this case of course, is not one in which it is sought to stay a prosecution already pending in a state court, such as *Stefanelli* v. *Minard*, 342 U. S. 117 (28 U.S.C. § 2283). Nor is it an application seeking a removal of an action under 28 U.S.C. 1443(2), *Greenwood* v. *Peacock*, —— U. S. ——, 16 L. ed. 2d 944.

3. Since there are no substantial issues of fact in this case, this court need not remand it, but may determine it itself, as it did in *Baggett*. This statement is not attenuated by the

affidavit of appellee Leary in which he states that no further prosecutions of Fenster under the statute are contemplated. As a public officer charged with the enforcement of the statute he cannot enter into a valid undertaking not to enforce a penal provision. The plain fact is that the actions of the police in this case speak louder than their words. The pattern of successive monthly arrests satisfy any exacting demonstration of probable future prosecution.

Conclusion

It is submitted that enough special circumstances have been shown to warrant the conclusion that the District Court was in error in not exercising its equitable jurisdiction, and since substantial constitutional questions are involved, review should be accorded to this case. The questions involved in this appeal are not only substantial, but are of public importance.

Respectfully submitted,

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APPENDIX A

Opinion.

TENNEY, *District Judge:*

On motion of plaintiff, a three-judge court has been convened pursuant to Title 28 U.S.C. § 2284 (1964). Plaintiff seeks an order enjoining the defendants from prosecuting him under subdivision 1 of Section 887 of the Code of Criminal Procedure of the State of New York, which plaintiff contends violates the fourteenth amendment by denying him due process of law, the equal protection of the laws, and by inflicting cruel and unusual punishment. He further contends that the statute is repugnant to the thirteenth amendment and denies him the privileges and immunities of citizens of the United States. Plaintiff also seeks a declaratory judgment that the statute is repugnant to the Constitution as already indicated, and a preliminary injunction pending the determination of this action.

Defendants Leary and Koota, while taking no position on the alleged unconstitutionality of the statute we are considering, request this Court to apply the traditional doctrine of abstention and to decline to exercise jurisdiction. While it is clear that this Court has jurisdiction pursuant to Title 28 U.S.C. § 1343(3) (1964), and has the power to issue a declaratory judgment, Title 28 U.S.C. § 2201 (1964), for the reasons we shall state, we believe that the facts present a proper case for absention, and accordingly the complaint will be dismissed.

The New York statute under attack reads as follows:

"Section 887. Who are vagrants

The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment."

Appendix A.

Under Section 892 of said Code of Criminal Procedure, a person found to be a vagrant may be committed to the penitentiary or county jail for a period not to exceed six months at hard labor. From the allegations of the complaint, it appears that plaintiff was arrested and charged with being a vagrant in violation of said statute on three occasions, viz., September 30, 1964, November 13, 1964, and December 11, 1964.

On each of the first two occasions plaintiff was, on the day of arrest, acquitted on the ground that the prosecution failed to establish sufficient facts to support a conviction of the plaintiff under the statute.

With respect to the third arrest, plaintiff commenced a proceeding in the nature of prohibition on December 18, 1964, in the Supreme Court of the State of New York, County of Kings. He sought a judgment against the Criminal Court of the City of New York prohibiting it from proceeding with his prosecution on the ground that § 887(1) was unconstitutional. A stay of the Criminal Court proceedings was granted, but on April 3, 1963, the Supreme Court dismissed plaintiff's petition (*Fenster* v. *Criminal Court*, 46 Misc. 2d 179, 259 N.Y.S. 2d 67). This dismissal was subsequently affirmed on October 25, 1965, by the Appellate Division of the Supreme Court, Second Judicial Department (24 App. Div. 2d 840, 263 N.Y.S. 2d 1010 (mem.)).

An appeal taken to the Court of Appeals of the State of New York was grounded on claims of constitutional violations; that Court, however, affirmed the judgment on March 24, 1966, on the sole ground that the denial was within the discretion of the lower court. The Court of Appeals expressly stated that it reached no other question (17 N. Y. 2d 641, 216 N. E. 2d 340, 269 N.Y.S. 2d 139). A motion to reargue was denied by the Court on June 2, 1966, and on June 27, 1966, the charge against plaintiff proceeded to prosecution in the Criminal Court. Once again he was,

on the same date, acquitted on the ground that the prosecution failed to establish sufficient facts to support a conviction under the statute.

Plaintiff alleges that he was held in nighttime confinement, arraigned and subjected to the expense of furnishing bail and counsel fees. Plaintiff further alleges that he has been threatened with further arrests under said statute as recently as May of this year, and that he fears another arrest unless this Court affords him the relief requested herein.

Defendant Leary is presently Commissioner of Police of the City of New York, and defendant Koota is the District Attorney of the County of Kings. Defendant Leary has filed an affidavit herein denying knowledge of any such threats having been made against plaintiff, and further stating that the Police have no intention of again arresting plaintiff as a vagrant.

In *Ex parte Young*, 209 U. S. 123 (1908), which has been called "the fountainhead of federal injunctions against state prosecutions",[1] the power of a federal court to enjoin a prosecution by a state official under a state statute unconstitutional on its face was upheld. "Since that decision, however, considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.'" Accordingly, such power will not be exercised save in exceptional cases "to prevent irreparable injury which is clear and imminent." *Douglas v. City of Jeannette*, 319 U. S. 157, 163 (1943).

In *Harrison* v. *NAACP*, 360 U. S. 167 (1959), the Supreme Court vacated the judgment of a three-judge statutory court permanently enjoining officials of the Commonwealth of Virginia from enforcing certain statutes which imposed conditions upon the right to make public solicita-

tion of funds and to expend such funds for litigation involving racial segregation. In referring to the doctrine of abstention, the Court stated that

> "in the service of this doctrine, which this Court has applied in many different contents, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Id.* at 176.

The type of special circumstance calling for exercise of federal jurisdiction rather than adherence to the doctrine of abstention is found in the Supreme Court's recent decisions in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), and *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). The statutes in *Baggett* required a loyalty oath as a condition of employment for teachers and State employees. In finding that the administration of the oath constituted sufficient irreparable injury to warrant avoidance of the abstention doctrine, the Court reasoned that the inherent vagueness of the oath prevented the oath-taker from determining permissible future conduct so as to avoid violating his oath and exposing himself to prosecution.

The Court was also concerned that a delay in adjudication on the merits could be "costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." 377 U. S. at 379. Resort to the State courts, it pointed out, could result in "piecemeal" and unduly protracted litigation. To abstain, it argued, would not open the way for a State court determination of the constitutional issue which would terminate the litigation—it would serve to prolong the litigation during which time the existence of the challenged statutes would abridge free expression, and their threatened application would discourage or "chill" protected activities.

This theme was repeated in *Dombrowski,* where the Court emphasized that abstention was not appropriate where unconstitutional vagueness deters the exercise of first amendment freedoms. Moreover, in that case, the good faith of the enforcement officers was attacked and there seemed little likelihood of a successful resort to the State courts to vindicate the defendant's rights.

Thus, in both *Baggett* and *Dombrowski,* the Court concluded that the vagueness of the statutes could not have been eliminated except by multiple prosecutions in the State courts, and in both cases the Court refused to apply the doctrine of abstention when its application and the resort to the State tribunals would prove ineffective in vindicating constitutional rights, or, more particularly, the right of free expression.

The exceptional nature of the circumstances before the Court in *Dombrowski,* as distinguished from those presented here, was emphasized in the recent case of *Zwickler* v. *Koota,* 66-C-375 E.D.N.Y., Sept. 19, 1966, where a three-judge court abstained from a determination of the constitutionality of Section 781-b of the New York Penal Law which prohibits, among other things, the distribution of anonymous political literature in quantity. Zwickler had previously been convicted of a violation of this section. His conviction was subsequently unanimously reversed on the facts, the constitutionality of the statute not being reached. He expressed fear of future prosecution in view of his intention and desire to distribute further copies of the anonymous leaflet which had occasioned his prior arrest.

Although Zwickler relied heavily upon *Dombrowski,* the three-judge court, after full discussion of the doctrine of abstention, held, with one judge dissenting, that the case did not present the special circumstances to justify the exercise of Federal judicial equity power. The Court in

Zwickler, noting that the Supreme Court's decision in *Dombrowski* did not repudiate the doctrine of abstention in all cases involving fourteenth amendment rights, emphasized the suitability of the New York provisions for a declaratory judgment action. N.Y.C.P.L.R. § 3001.

The instant case is clearly distinguishable from *Dombrowski* and *Baggett*. Plaintiff does not claim that the statute is vague or that prolonged litigation in the State courts would be required to determine its constitutionality. Neither does he claim that first amendment rights are involved. He asserts in his memorandum of law that to penalize a person because he is poor or is an idler is outmoded in today's society; that vagrancy statutes have been improperly used, and, in his case, are employed as an instrument of harassment; that the statute is unconstitutional because it (a) "interferes with and impairs the liberty of a citizen to exercise his faculties as long as he does not interfere with others"; (b) "punishes a person because of his status"; (c) "requires involuntary servitude in violation of the Thirteenth Amendment"; (d) "denies plaintiff the equal protection of the laws"; and (e) deprives plaintiff "of the privileges and immunities guaranteed by the Federal Constitution." He also makes reference to cruel and unusual punishment, stating that repeated offenses may incur repeated penalties, an argument scarcely of constitutional dimensions.

Nowhere does plaintiff assert that the statute is facially unconstitutional "as abridging free expression" or that as in *Dombrowski* it has been applied for such purposes. The constitutional challenge to this statute which emerges is that the type of conduct, or "status", if you will, that is covered thereby cannot constitutionally be proscribed. There is no showing of inability to obtain vindication of plaintiff's constitutional rights in any subsequent state prosecution, either by preliminary motion attacking the

statute's constitutionality or by motion to arrest judgment, with right of appeal from the trial court's determination. Clearly, the disputed claim of further harassment of plaintiff does not approach the dimensions of the harassment in *Dombrowski*, which "resembled only too closely those tactics employed by totalitarian regimes dedicated to suppressing freedom of expression.'"

As heretofore noted, no claim is made that the statute is so vague that resort to the State's declaratory judgment procedures would be unavailing, as was suggested in *Baggett*. This case, therefore, more closely resembles that described by the Supreme Court in *Baggett*, as follows:

> "In the bulk of abstention cases in this Court, including those few cases where vagueness was at issue, the unsettled issue of state law principally concerned the applicability of the challenged statute as to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation." 377 U. S. at 376-77. (Footnotes omitted.)

Plaintiff's lack of success in seeking an order of prohibition in the New York courts does not call for exercise of Federal jurisdiction, since prohibition was the wrong remedy. The remedy of prohibition in New York is an extraordinary one, available only upon a clear showing that a court or body possessing judicial powers is exercising, or threatening to exercise, jurisdiction over matters not within its cognizance. N.Y.C.P.L.R. § 7801; *People ex rel. Livingston* v. *Wyatt*, 186 N. Y. 383; 79 N. E. 330 (1906). It is viewed with caution, limited to cases of extreme necessity, resorted to with infrequency, and not favored. *Cooley* v. *Wilder*, 234 App. Div. 256, 255 N. Y. Supp. 218 (4th Dep't 1932); see *Culver Contracting Corp.*

v. *Humphrey,* 268 N. Y. 26, 196 N. E. 627 (1935). As a general rule it is issued not as a matter of right, but only in the exercise of sound discretion, and then only where it is clearly shown that no other adequate remedy is available. Where a defendant in a criminal proceeding will have the opportunity to raise the question of the court's jurisdiction, either by motion at the commencement of trial or in arrest of judgment, with a right of appeal from an adverse decision, a prohibition order has been denied. *Kenler* v. *Murtagh,* 12 App. Div. 2d 662, 209 N.Y.S. 2d 384 (2d Dep't 1960 (mem.); *People ex rel. New York Disposal Corp.* v. *Freschi,* 173 App. Div. 189, 159 N. Y. Supp. 23 (2d Dep't 1916); *Rose* v. *McKean,* 190 Misc. 982, 76 N.Y.S. 2d 391 (Sup. Ct. 1948). And this principle has been involked to avoid passing upon the constitutionality of a criminal statute. *People ex rel. Burbank* v. *Wood,* 21 App. Div. 245, 47 N. Y. Supp. 676 (2d Dep't 1897).

Unlike a petition for an order of prohibition, an action for a declaratory judgment (N.Y.C.P.L.R. § 3001) has been recognized in New York as a remedy available to a defendant seeking to test the constitutionality of a New York criminal statute under which prosecution is threatened. *New York Foreign Trade Zone Operators, Inc.* v. *State Liquor Authority,* 285 N. Y. 272, 34 N. E. 2d 316 (1941); *De Veau* v. *Braisted,* 5 App. Div. 2d 603, 174 N.Y.S. 2d 596 (2d Dep't 1958), aff'd 5 N. Y. 2d 236, 157 N. E. 2d 165, 183 N.Y.S. 2d 793 (1959), aff'd 363 U. S. 144 (1960).

> "One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a prerequisite to judicial entertainment of the question, that interested parties first commit the very acts which

> are involved in the dispute and thereby run the risk of such prosecution (*New York Foreign Trade Zone Operators* v. *State Liq. Auth., supra,* p. 278)." *De Veau* v. *Braisted,* 5 App. Div. 2d at 607, 174 N.Y.S. 2d at 600.

There is no suggestion that in a declaratory judgment proceeding the courts of New York would be less enlightened than the Federal courts.

Furthermore, should "special circumstances" arise which would not justify further abstention, plaintiff may seek appropriate relief in the Federal courts.[4]

The complaint is dismissed by order of this Court. Settle an order consistent herewith on or before ten (10) days from the date hereof.

Dated: New York, New York,
December 7, 1966.

HON. IRVING R. KAUFMAN, U.S.C.J.
HON. CHARLES H. TENNEY, U.S.D.J.
HON. WALTER R. MANSFIELD, U.S.D.J.

---

[1] Pg. 6. *Dombrowski* v. *Pfister,* 380 U. S. 479, 483 (1965).

[2] Pg. 6. *Id.* at 484. (Footnote omitted.)

[3] Pg. 11. Concurring opinion of Kaufman, C.J., in *Zwickler* v. *Koota,* 66-C-375, E.D.N.Y. Sept. 19, 1966.

[4] Pg. 14. See, *e.g., Monroe* v. *Pape,* 365 U. S. 167 (1961).

APPENDIX B

Order.

Docket No. 66 Civ. 1927

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHARLES FENSTER,

Plaintiff,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Defendants.

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 887, Subd. 1 of the Code of Criminal Procedure of the State of New York on the ground the said law is unconstitutional, and for a declaratory judgment, declaring said statute to be repugnant to the Constitution of the United States, and for convening of a statutory three-judge court to hear said application; and the motion for the convening of a statutory three-judge court having been granted by the Hon. Charles H. Tenney, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the Second Circuit, the Hon. Charles H. Tenney, Judge of the United States District Court for the Southern District of New York and the Hon. Walter R. Mansfield, United States District Judge for the Southern District of

New York, having been convened on October 21, 1966 and the said application having been heard on said date and the said court having filed its opinion on December 7, 1966 in favor of the defendants, wherein in its discretion the Court abstained from exercising jurisdiction in the action,

ORDERED, that the motion of the plaintiff for a preliminary injunction be and the same is hereby denied; and it is further

ORDERED, that the complaint be and hereby is dismissed.

Dated: the 13th day of December, 1966.

IRVING E. KAUFMAN,
United States Circuit Judge.

CHARLES H. TENNEY,
United States District Judge.

WALTER R. MANSFIELD,
United States District Judge.

FILED
JAN 20 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 905

CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

On Appeal from the United States District Court, Southern District of New York

MOTION TO DISMISS OR AFFIRM

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Stanley Buchsbaum,
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IN THE

Supreme Court of the United States

October Term, 1966

No. 905

CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

On Appeal from the United States District Court, Southern District of New York

MOTION TO DISMISS OR AFFIRM

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, entered on December 14, 1966, denying appellant's motion for a preliminary injunction and dismissing his complaint on the ground that the Court, in its discretion, should not exercise jurisdiction of the action.

Facts

Appellant is a citizen of the United States and is a resident of Brooklyn, New York. Appellee Leary has been the Police Commissioner of the City of New York since February 21, 1966; appellee Koota is the District Attorney of the County of Kings, State of New York.

The appellant's complaint alleges that the appellant was arrested on three occasions in 1964 and charged with being a vagrant in violation of Section 887, subdivision 1 of the Code of Criminal Procedure of the State of New York (66 McKinney's Consolidated Laws of New York, Part 3). The first such arrest was on or about September 30, 1964, and the appellant was acquitted of the charge. The second arrest was on or about November 13, 1964, and the appellant was again acquitted.

The third arrest took place on December 11, 1964, and the appellant shortly thereafter commenced an action in the nature of prohibition in the Supreme Court of the State of New York in which he sought a stay of the criminal proceedings on the ground that the statute under which he was charged was unconstitutional. In *Matter of Fenster* v. *Criminal Court, N. Y.*, 46 Misc. 2d 179, 259 N. Y. S. 2d 67 (1965), the court dismissed appellant's petition saying that he had failed to show that he had a clear right to the relief sought. The dismissal was affirmed by the Appellate Division of the Supreme Court, Second Department, 24 A. D. 2d 840, 263 N. Y. S. 2d 1010 (1965), and by the Court of Appeals of the State of New York, 17 N. Y. 2d 641, 216 N. E. 2d 340 (1966).

After the affirmance by the Court of Appeals, the appellant was tried and acquitted of the charge of December 11, 1964.

Appellant then alleged in his present complaint that, during the pendency of the proceedings before the Supreme Court of the State of New York for a judgment of prohibition and the appeals from the judgment adverse to appellant therein, appellant was threatened by the police with further arrests under the vagrancy law. No places, precise dates or other circumstances are alleged in connection with the alleged threats. Appellant concluded his complaint with the allegation that he feared immediate arrest and subjection to repeated prosecutions under the vagrancy law.

Appellee Leary, however, stated in his affidavit in opposition to appellant's motions for a three-judge court and a preliminary injunction that his investigation of the allegations of the complaint revealed that no threats to arrest appellant under Section 887, subdivision 1, were made by members of the Police Department. Appellee Leary further stated that the Police Department had no intention of arresting appellant under the statute in question at the time of the making of the affidavit or at some time in the future.

ARGUMENT

The claim that the Court below erred in dismissing, in its discretion, the appellant's complaint without deciding the constitutional issues presented by appellant does not present a substantial federal question.

In a yet unreported decision, the court below in the exercise of its discretion, decided to abstain from exercising jurisdiction of the claims presented by the appellant. (The court's opinion is attached to appellant's jurisdictional statement as Appendix A.) Hence, the asserted constitutional objections to the New York vagrancy law raised by the appellant were not reached by that court.

It is well settled that federal courts have equity jurisdiction where state officers "threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Ex Parte Young,* 209 U. S. 123, 156 (1908). It is also well settled, however, that "* * * considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Dombrowski* v. *Pfister,* 380 U. S. 479, 484 (1965). Hence, such equitable power will be exercised in only exceptional cases "to prevent irreparable injury which is clear and imminent". *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163 (1943).

In *Douglas* v. *City of Jeannette, supra,* this Court refused to enjoin the enforcement of a city ordinance saying

that the declared intention of the defendants to institute prosecutions was insufficient to establish irreparable injury "both great and immediate". Injunctive relief was denied in that case even though the ordinance there attacked had been found unconstitutional in a companion case decided the very same day as *Douglas* v. *City of Jeannette, supra.* See *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943).

In *Harrison* v. *NAACP,* 360 U. S. 167, 176 (1959), in vacating the judgment of a three-judge court enjoining officials of the Commonwealth of Virginia from enforcing certain state statutes, this Court again noted that state courts should first have the opportunity to interpret state laws "fairly open to interpretation".

Baggett v. *Bullitt,* 377 U. S. 360 (1964), and *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), do not require a departure from the doctrine of abstention in this case, but in fact demonstrate this cases' lack of those special circumstances which would justify the exercise of federal jurisdiction. In both *Baggett* and *Dombrowski* unconstitutional vagueness of the statutes attacked had the immediate effect of inhibiting the exercise of First Amendment freedoms. In addition, abstention in those cases, this Court pointed out, could result in protracted litigation without an authoritative decision by the state courts during which time the existence of the statutes attacked would abridge free expression.

In this case, the appellant does not claim that the statute is vague or that prolonged litigation in the courts of the State of New York would be required to gain a decision on

the constitutionality of the statute. Furthermore, appellant's array of constitutional arguments against the statute does not include a claim that the statute abridges free expression in violation of the First Amendment. Lastly, appellant's questioned claim of "harassment" does not begin to approach the facts presented in *Dombrowski, supra.*

Appellant appears to have an appropriate and complete remedy in an action for a declaratory judgment in the New York courts. Although the Court in *Reed* v. *Littleton,* 275 N. Y. 150, 9 N. E. 2d 814 (1937), refused to entertain a declaratory judgment action seeking construction of a criminal statute, both the dictum in that case (275 N. Y. at 153, 9 N. E. 2d at 815-816) and a more recent case appear to establish the right to such an action where the constitutionality of a criminal law is challenged by one actually threatened with prosecution under such statute. *De Veau* v. *Braisted,* 5 A. D. 2d 603, 174 N. Y. S. 2d 596 (2d Dept. 1958), aff'd, 5 N. Y. 2d 236, 157 N. E. 2d 165, 183 N. Y. S. 2d 793 (1959), aff'd, 363 U. S. 144 (1960). And, it is also clear that appellant's failure to obtain an order of prohibition in the New York courts does not require the exercise of Federal jurisdiction. Prohibition, as distinguished from declaratory judgment, was the wrong remedy. *E.g., Kenler* v. *Murtagh,* 12 A. D. 2d 662, 209 N. Y. S. 2d 384 (2d Dept., 1960) [mem.]; *People ex rel. New York Disposal Corp.* v. *Freschi,* 173 App. Div. 189, 159 N. Y. Supp. 23 (2d Dept., 1916).

Hence, the Court below properly found that the facts pleaded by the appellant did not warrant departure from

the doctrine of abstention. Not only did appellant fail to show irreparable injury "both great and immediate", he also failed to show that his remedies in the state courts are inadequate. On this showing, abstention is required under the decisions of this Court.

CONCLUSION

The appeal to this Court from the judgment of the order of the United States District Court, Southern District of New York, should be dismissed, or the judgment affirmed.

January 18, 1967

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 905

CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

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CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee Aaron E. Koota, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to affirm the order of the statutory three-judge District Court below.

Opinion Below

The opinion of the statutory court dated December 7, 1966, is unreported and appears as appendix A to appellant's jurisdictional statement.

Jurisdiction

Appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1253.

Statutes Involved

N. Y. Code of Crim. Proc. § 887, subd. 1

N. Y. Rev. Penal Law § 240.35

N. Y. CPLR § 3001

N. Y. CPLR, Art. 78

Question Presented

Did the statutory court, under the circumstances here, abuse its discretion in abstaining from exercising its jurisdiction and requiring appellant to pursue his remedies in the Courts of New York?

Statement

This is a direct appeal from an order entered in the United States District Court for the Southern District of New York on December 14, 1966 by a statutory court which denied and dismissed appellant's application for a preliminary injunction and complaint, respectively.

The appellant commenced this action below seeking a judgment declaring unconstitutional § 887, subd. 1 of the New York Code of Criminal Procedure.* The complaint

* The text of New York Code of Criminal Procedure § 887, subd. 1, is set forth in the appellant's "Statement as to Jurisdiction." Most of the provisions currently found in section 887 have been transferred to and included in the Revised Penal Law of New York.

(Footnote continued on following page)

alleges that appellant was arrested on three occasions in 1964 and charged with violation of New York's vagrancy statute, § 887, subd. 1. He was acquitted of the first two charges. Subsequent to his third arrest under that statute, the appellant commenced a proceeding in the state courts to prohibit the criminal court from hearing the charge of vagrancy against him on the ground that such court was acting in excess of its jurisdiction since the vagrancy statute was unconstitutional.

The State Supreme Court, Kings County, dismissed appellant's prohibition proceeding* on the ground that the statute in question was not, on its face, unconstitutional and that accordingly he failed to show a clear legal right to the relief requested. The state court held that appellant, thus, was required to pursue the usual procedures and remedies available to him. *Matter of Fenster* v. *Criminal Court,* 46 Misc. 2d 179, 259 N.Y.S. 2d 67 (Kings Co.), *aff'd* 24 A. D. 2d 840, 263 N.Y.S. 2d 1010 (2nd Dept), *aff'd* 17 N. Y. 2d 641, 216 N. E. 2d 342, *motion for reargument denied,* 17 N. Y. 2d 918.

It must be noted that the respondent Criminal Court, by its attorney, the Attorney General of the State of New York, cross-moved in the state court to dismiss the petition on the ground that a prohibition proceeding was an improper remedy in New York to test the constitutionality of a state statute and that appellant should properly have availed himself of other adequate remedies. The New York appellate courts in affirming the granting of the state's cross-motion, held only, therefore, that the peti-

(Footnote continued from preceding page)

This revised law, effective September 1, 1967 omits the specific provisions involved here. However, it should be noted that the revision of New York's Criminal Code is still in progress; thus although it cannot be authoritatively stated that the provision challenged here will not be included in the revised Criminal Code, the inference strongly suggests that it will not.

* This special proceeding is authorized by the New York Civil Practice Law and Rules, Article 78.

tion was technically insufficient and reached no decision on the constitutional question raised by appellant.

Following the affirmance by the New York Court of Appeals (17 N. Y. 2d 641, 216 N. E. 2d 342), the appellant was tried and acquitted of the third charge of vagrancy.

The appellant in his complaint to the District Court below, simply alleged, without more, that during the pendency of his abortive state court proceeding described above, he was threatened by the police with further arrest and he concludes that he will be subjected to further arrest and prosecution under the vagrancy statute.

The appellee Howard R. Leary, in an affidavit filed in this action, avers that no such threats were made by members of his police force.

No hearing was held before the statutory court below since argument was initially limited by the consent of the parties here to the determination of whether that court should, under the circumstances presented here, abstain from exercising jurisdiction.

In invoking the principle of abstention and, accordingly, in its discretion, dismissing the petitioner's complaint, the statutory court found that none of the special circumstances which were present in *Dombrowski* v. *Pfister,* 380 U. S. 479 and in *Baggett* v. *Bullitt,* 377 U. S. 360, were applicable here. The unanimous three-judge court additionally held that federal jurisdiction should not be exercised simply because appellant improperly instituted a state prohibition proceeding where it is clear that New York affords a declaratory judgment action which is the proper remedy available to an aggrieved party to test, in the first instance, the constitutionality of a state criminal statute (New York Civil Practice Law and Rules § 3001).

ARGUMENT

The statutory court's application of the principle of abstention, under the circumstances here, was a proper exercise of equitable discretion.

It has long been established that the federal courts are extremely cautious in their resort to federally interfere with the state's administration of its criminal laws and normally the "imminence" of a criminal prosecution is not a ground for federal equity relief. *Douglas* v. *Jeannette,* 319 U. S. 157, 163-164. To justify such interference by the federal courts there must be exceptional circumstances and a clear showing, absent here, that an injunction is necessary in order to afford adequate protection of constitutional rights. *Fenner* v. *Boykin,* 271 U. S. 240, 243-244.

This Court in *Dombrowski* v. *Pfister,* 380 U. S. 479, simply re-echoed this proposition; it did not repudiate the long line of decisions flowing from *Douglas* v. *Jeannette, supra.*

Although *Dombrowski, supra,* did hold that the traditional abstention doctrine will not lie where the "defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights." *Id.* at 484-485, the appellant's assertions, as amply illustrated in the opinion below (Statement as to Jurisdiction, appendix A), clearly do not establish any such circumstance which would require the statutory court to exercise its jurisdiction here.

Similarly in *Baggett* v. *Bullitt,* 377 U. S. 360, this Court found that the vagueness of the statute there involved would render the State's declaratory judgment procedure unavailing and accordingly the state court proceedings would not result in the vindication of that petitioner's constitutional rights.

In the instant case, however, no claim is made by the appellant that the state vagrancy statute is vague or will abridge his free expression. Even more critical is the apparent fact that there is no showing by the appellant that state court procedures would be ineffective to vindicate his constitutional rights. Without question, New York provides him with an adequate remedy. If appellant does not wish to wait for a criminal prosecution to assert his challenge to the constitutionality of New York Code of Criminal Procedure § 887, subd. 1, he may, if aggrieved, institute an action for a declaratory judgment in the state court under N. Y. CPLR § 3001.* As the state Appellate Division observed in *DeVeau* v. *Braisted*, 5 A. D. 2d 603, 607 (2d Dept.), *aff'd* 5 N. Y. 2d 236, 157 N. E. 2d 165, *aff'd* 363 U. S. 144, in upholding the use of declaratory judgment to test the validity of a penal statute:

> "one of the very purposes of a declaratory judgment is to settle a serious question of law as the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a prerequisite to judicial entertainment of the question, that interested parties first commit the very acts which are involved in the dispute and thereby run the risk of such prosecution."

The appellant's difficulty with the state adjudicatory process was that he sought to vindicate his alleged claim through an unsound procedural device, i.e., a state prohibition proceeding. By so improperly pursuing this remedy, the state courts have not been "afforded a reasonable opportunity to pass upon" the constitutionality of

---

* N. Y. CPLR § 3001 provides:

"The Supreme Court may render a declaratory judgment having the effect of a final judgment to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or can be claimed. If the Court declines to render such a judgment it shall state its grounds."

the state statute in question (*Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, 176), a prerequisite under the circumstances here, to the federal court's initial assumption of jurisdiction.

CONCLUSION

The appellee respectfully prays that the judgment below be affirmed.

Dated: New York, New York, January 23, 1967.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FENSTER *v.* LEARY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 905. Decided February 13, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.